

of Advocacy disagrees. Any small LEC located in the path of Hurricane Andrew will strenuously differ with the Commission's analysis. However, one need not look at natural disasters to find the FCC's logic wanting. The relocation of a major employer into a rural area may require significant upgrading in plant and equipment not reflected in historical trends. The FCC, in its effort to ease the burdens associated with tariff filings, may make it impossible for small companies to provide new equipment or service to new customers if that requires cost deviations higher than the historic norm.

The Office of Advocacy recommends that the Commission authorize the filing of tariffs based on either historical costs or prospective costs or a combination of both. This option will allow LECs to select the cost data that they feel best fits the needs of their systems. This may require more oversight effort on the part of the Common Carrier Bureau staff but will lessen the regulatory load on small carriers. This not only comports with the stated goals of this rulemaking; it also achieves the aims of the RFA and Paperwork Reduction Act.²⁵

²⁵ Congress enacted both the RFA and Paperwork Reduction Act in an attempt to shift the burden of regulation from small business to government agencies.

B. New Services

The Office of Advocacy concurs with the Commission's finding that new services are vital to the health of small LECs and the communities they serve. Thus, we are nonplussed at the FCC's tentative decision to require new services be priced no higher than a neighboring LEC offering the same service.

This tentative decision is likely to lead to confusion and a lack of new services. First, if a LEC wishing to offer a new service neighbors more than one LEC offering the service, the Commission provides no guidance in selecting the appropriate rate for the new service.²⁶ Second, the small size of a LEC may make it impossible to achieve the economies of size and scale needed to match the rate of the neighboring LEC. It is unlikely that a LEC could afford to offer the service under these strict pricing guidelines. This will be detrimental to the LEC, its customers, the rural telecommunication infrastructure, and the achievement of universal service.

²⁶ This probably is not an uncommon occurrence. For example, within the Research Triangle area of North Carolina, there are three telephone companies, a GTE operating company, a BellSouth operating company, and an independent telephone company. If the independent wishes to offer a new service already supplied by GTE and BellSouth, the independent does not know whether to select GTE's or BellSouth's rate.

The Office of Advocacy recommends that the new service tariffs be based on rates charged for the same service by similarly situated (in terms of location, customer base, and population density) LECs not subject to incentive or price caps regulation. If no such LEC exists, the Commission should select a carrier subject to incentive regulation that has a cost and operating territory most akin to that of the baseline carrier. The Office of Advocacy's recommendation will assist rather than hinder the introduction of new services and technology into rural areas, will help LECs retain their customer base, and will not endanger universal service by forcing the subsidization of new service with higher rates from other customers.

C. Mergers and Acquisitions

While the FCC's attempts to reduce the regulatory burdens are admirable, its treatment of exchange acquisition is anomalous. The LEC must petition the Commission to allow it to merge exchanges. If the permission is not granted, then the acquiring LEC must maintain that exchange under incentive regulation.

This process places a dual burden on small LECs. They must expend resources on the petition to the FCC. Second, if the Commission decides that the merger will not be in the public interest, the acquiring LEC's maintenance of two different

regulatory regimes will create an administrative nightmare. In all likelihood, LECs subject to baseline regulation will not take the risk. LECs will refuse to acquire such exchanges even though there may be service efficiencies which may benefit all LEC customers. The Commission must not impose unnecessary barriers to the efficient provision of service by LECs.

The Office of Advocacy opines that the FCC must modify this proposal to reduce costs and allow LECs to obtain efficiencies associated with network consolidation. The Office of Advocacy recommends that the Commission permit a merger of exchanges by baseline carriers without prior approval. The FCC would be authorized to prevent that merger but only after it carried the heavy burden of demonstrating that the merger was antithetical to the public interest.

D. Summary

The Office of Advocacy generally commends the Commission's efforts to reduce the regulatory burden on the smallest LECs. However, there are a number of tentative proposals which will prevent the FCC from minimizing the burdens on small LECs. The Office of Advocacy believes that proper utilization of the RFA would have revealed these problems to the Commission. The Office of Advocacy suggests that FCC reexamine its proposals on baseline regulation within the perspective of the RFA. The Office of

Advocacy believes that results will provide the basis for even greater regulatory relief for LECs.

IV. Compliance with the RFA

The Commission concluded that the RFA does not apply to this rulemaking and did not perform a regulatory flexibility analysis despite the obvious impact that this proposal has on small business. The Commission noted that the definition of a small business under the RFA is one that is independently owned and operated and not dominant in its field.²⁷ 5 U.S.C. § 601(3). The Commission, having previously determined that all LECs are dominant in their field, then simply concluded that these companies are not small businesses. The FCC's logic represents a constricted view of the RFA; the Office of Advocacy gives a broader interpretation to the Act.

The RFA also permits an agency for purposes of complying with the Act to select a different definition of small business after consultation with the Office of Advocacy. Nothing in the

²⁷ This definition is identical to that in the Small Business Act, 15 U.S.C. § 632. Pursuant to that Act, the Small Business Administration developed size standards for many classes of businesses to carry out its mandate of providing financial, procurement, and technical assistance to small businesses. Those size standards do not apply to the regulatory regimes of other agencies but are used by the agencies in complying with the RFA. Congress expected that such utilization of the Small Business Administration size standards.

RFA requires an agency to adopt that definition to carry out its statutory mandate. The Office of Advocacy interprets the RFA to give the FCC sufficient discretion to adopt one size standard for regulatory purposes and another for compliance with the analytical requirements of the Act. Therefore, the Commission can analyze the impact of these rules while maintaining its distinction between dominant and non-dominant common carriers.

Even if the Commission asserts that such dual standards are unworkable, the Office of Advocacy contends that the FCC's conclusion concerning dominance of small LECs is incorrect. The FCC argues that small LECs are monopoly providers of telecommunication services and by definition dominant. Yet, the Commission scatters throughout the NPRM references to the competition faced by smaller LECs. If the Commission believes that competition presents a serious enough challenge that regulatory modifications must be made to ensure the financial health of these LECs, then the Commission cannot assert that these carriers are monopolies and dominant in their fields. Thus, the LECs are small businesses under the RFA and the Commission should have prepared a regulatory flexibility analysis. We request that prior to the adoption of a final rule, the FCC prepare an analysis pursuant to § 604 of the RFA.

Nor would the Commission find adequate justification to avoid its obligation by contending that these carriers still

dominate the provision of local exchange service -- a conclusion that the Office of Advocacy will not gainsay. Commission precedent exists for disparate regulatory treatment of different portions of an individual carrier's service. In the proceeding to streamline the regulation of AT&T,²⁸ the Commission concluded that AT&T was no longer the dominant provider of many types of business services even though it remained dominant in the provision of 800, residential, and small business services. Streamline Proceeding, slip op. at ¶¶ 147, 165. The Office of Advocacy sees no obstacle to finding that small LECs are no longer dominant in the provision of transport services to IXCs and the RFA applies to them in that capacity. This determination will not upset the Commission's otherwise finely-honed regulatory scheme yet will give the FCC adequate tools to examine the impact of regulatory reform on small carriers.

V. Conclusion


The Office of Advocacy commends the Commission for undertaking an examination of the regulatory burdens faced by small LECs. The Office of Advocacy supports regulatory reform insofar as it will not jeopardize the financial health and operating ability of LECs. Small LECs must retain the option of


²⁸ In the Matter of Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order (October 25, 1991) (Streamline Proceeding).

selecting the regulatory regime which best suits their financial structure and customer base. Only in this manner will the goals of universal service, improved infrastructure, and reduced regulatory burdens be met.

Within these parameters, the Office of Advocacy believes that a number of modifications can be made to the FCC's proposal. These changes will reduce the administrative burden on small carriers. The Office of Advocacy interprets the RFA as applicable to this proceeding and believes that utilization of its analytical techniques will reveal even more ways to lighten the regulatory load on small LECs. If the Commission has any questions with respect to compliance with the RFA, please do not hesitate to contact Barry Pineles of my staff.

Respectfully submitted,


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